RECENT DEVELOPMENTS

STATE SCHOOL BOARD PRAYER RULED UNCONSTITUTIONAL

Engel v. Vitale
370 U.S. 421 (1962)

As a result of the "recommendation" of the State Board of Regents, the district school principal, following the direction of the Board of Education of Union Free School District No. 9, New Hyde Park, New York, prescribed that each morning during opening exercises each class, in the presence of a teacher, would recite a prayer. The prayer was short and nondenominational: "Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country." The prayer was voluntary in the sense that with parental endorsement, a child would be allowed to refrain from participation or even to leave the room if he so desired.

Several parents, finding the prayer repulsive to their beliefs, objected to this imposition upon classroom activity. An action was brought to enjoin the recitation of the prayer asserting that its imposition transgressed the first amendment as applied to the states by the fourteenth amendment. The language of the Constitution is: "Congress shall make no law respecting an establishment of religion. . . ." Plaintiff lost at three judicial levels in the State of New York.[1] However, the Supreme Court of the United States reversed the New York Court of Appeals, holding "that by using its public school system to encourage recitation of the Regent's prayer, the State of New York has adopted a practice wholly inconsistent with the establishment clause."[2] The Court found that the prayer "is a religious activity . . . a solemn avowal of divine faith and supplication for the blessings of the Almighty."[3] The Court further declared that the "establishment clause" must at least mean "that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[4] The opinion was fortified by reflection upon the history of religious oppression in Europe as well as in the Colonies. It was concluded that our Founding Fathers "were no more willing to let the content of their prayers and their privilege of praying whenever they pleased by influenced by the ballot box than they were to let these vital matters of personal conscience depend

[1] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961). The New York courts held that freedom not to participate saved the prayer constitutionally.

[2] Engel v. Vitale, 370 U.S. 421, 424 (1962).

[3] *Ibid.*

[4] *Id.* at 425.

upon the succession of monarchs."[5] The holding, tersely stated, is that any government, be it federal or state, is without power to prescribe official prayers. Seemingly the Court concludes that the concern surrounding the adopting of the first amendment is good evidence as to the purpose of the fourteenth in imposing restraint upon the states.

Although the prayer constituted only a slight infringement upon the constitutional safeguard, the Justices were quick to admonish that, in the words of James Madison, "It is proper to take alarm at the first experiment on our liberties."[6]

In another significant judicial footnote,[7] Mr. Justice Black, writing for the majority, made clear that essentially patriotic and ceremonial activities were not affected. When used for patriotic and ceremonial purposes, reciting historical documents or songs, singing officially espoused anthems which include the composer's professions of religious belief, and other manifestations of God in ceremonial occasions of public life do not fall within this proscription against government sponsorship of religion. These activities are not essentially "religious activity." The import of the footnote accords with the affirmation in the body of the opinion that "The history of man is inseparable from the history of religion."[8]

The text of the majority opinion is unusual in that it makes no effort to garner support from prior cases dealing with the "establishment clause." There is no reference to the three leading cases either to support the majority conclusion or to distinguish the present set of facts. Yet on close analysis it seems that the earlier decisions of *Everson v. Board of Education*, *McCollum v. Board of Education*, and *Zorach v. Clausen* are not inconsistent with this latest holding.[9]

The *Everson* court, in asserting that payment to parents of parochial school children to reimburse them for transportation costs was constitutional, in effect held that where the primary purpose of the government activity was secular—in that case the safe transportation of school children to and from a place of education—an incidental religious benefit would not make the payment unconstitutional. The *Engel* court, in the tradition of *Everson*,

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[5] *Id.* at 429.

[6] *Id.* at 436.

[7] *Id.* at 435. Footnote 21 to the opinion reads as follows:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

[8] *Id.* at 434.

[9] Everson v. Bd. of Education, 330 U.S. 1 (1947); McCollum v. Bd. of Education, 333 U.S. 203 (1948); Zorach v. Clausen, 343 U.S. 306 (1952).

held that the prayer was strictly a religious activity and that no secular purpose was served by it, much less a dominant secular purpose. On the other hand, where the activity challenged has a predominantly patriotic or ceremonial purpose, the incidental reference of aid to religion will not invalidate it.[10]

Mr. Justice Douglas in his concurring opinion defines the issue more narrowly to be whether the state can finance a religious exercise. He cannot reconcile *Everson.* But his major objection lies in the fact that to him any aid, financial or otherwise, to a religious activity, even though it be incidental, is a violation of the Constitution. Douglas obviously sees problems now which did not occur to him in 1947 when he voted with the *Everson* majority, or in 1952 when he spoke of the desirability of government respecting "the religious nature of our people" and accommodating the public service to their spiritual needs.[11]

In *McCollum v. Board of Education,* a local school board allowed religious teachers employed by private religious groups to come into the classroom during regular hours to hold classes in religious instruction. The Court ruled this practice unconstitutional. This was so, even though students who elected not to take the religious instruction could pursue their secular studies in another room. Mr. Justice Black, writing for the majority, found that the school was allowing its compulsory machinery to be used in the fostering of religion. Even more important, the school building itself, tax-supported, was being used to aid religious groups in spreading their faith. Black quoted his earlier opinion in *Everson*: "There we said: 'Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' "[12]

The decision in *Zorach* was rendered shortly after the *McCollum* case was decided. Mr. Justice Douglas wrote the opinion for a majority which seemed to be softening the requirements set up in the earlier "released time" case.[13] In New York City, upon parental request, children were allowed to leave school during regularly scheduled school hours to attend religious training classes. Those students who did not attend the outside classes remained in the classroom to study secular subjects. Here, as in *McCollum,* the compulsory attendance machinery was working to the benefit of the religious groups. However, the Court, upholding this method of "released

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10 Engel v. Vitale, *supra* note 2, at 435 (footnote 21).

11 Zorach v. Clausen, *supra* note 9, at 313.

12 McCollum v. Board, *supra* note 9, at 210.

13 Serious doubt is now cast upon the status of *Zorach* as good law. The decision was 5-4 with Mr. Justice Douglas writing for the majority. Douglas' language in his concurring opinion in *Engel* and his majority opinion in Torcaso v. Watkins, 367 U.S. 488 (1961), indicate that the Justice has had an important change of heart. In *Torcaso,* in which the Court struck down a Maryland constitutional requirement that a profession of belief in God is a prerequisite to hold public office, Douglas said (367 U.S. at 495): "Neither [the State or Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers. . . ."

time" religious education, distinguished *McCollum*, saying "this . . . program involves neither religious instruction in public school classrooms nor the expenditure of public funds."[14] Disregarding the contention of the minority that here was the same kind of compulsion as in *McCollum*, the Court upheld the New York City regulation and stressed that school buildings were not used for religious activity: the school "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."[15]

It may be that as a result of the reaffirmation of the evils of compulsion in *Engel*, if the facts of *Zorach* again reach the Supreme Court, the decision would be different. With the passage of time, the Court has perhaps recaptured the courage demonstrated in *McCollum*. Be that as it may, the holding in *Engel* is certainly not in conflict with that in *Zorach* or *McCollum*, and likewise it accords with *Everson*.

It is interesting to consider here the extent to which the obiter dictum of Chief Justice Warren in the *Sunday Closing Cases*[16] might foreshadow a change in the approach the Court would take in analyzing the facts of *Zorach*. The Chief Justice, following the principle established in *Everson*, confirmed that government may adopt laws with secular goals which may include incidental religious benefits; but these benefits must be necessary in that the secular goal sought may not be obtained through any reasonable alternative method. Probably an analysis of *Zorach* now would be less inclined to follow the "direct financing" distinction and more likely to look for a secular purpose being served. From this latter perspective, it is difficult to conclude that there is any secular purpose in a released time arrangement to which religious benefit is a necessary and incidental effect. However, *quaere* whether the Court is inclined to follow Chief Justice Warren's dictum in light of the *Engel* effort to preserve "many manifestations in our public life of belief in God."[17] It may be that *Zorach* and this latest dictum can be rationalized by a new doctrine of *"de minimis* religious benefit" of such minor consequence that the Court will pay it no heed. At any rate, these are grounds for arguing that Warren's *Sunday Closing* dictum has been superceded by a more liberal dictum apparent in *Engel*.

The New York practice failed because it was purely religious activity on school property. The only benefit being derived was a religious one. The problem was accentuated by the particularly compelling nature upon children of the psychological pressures of conformity.

Mr. Justice Stewart, in the lone dissent, expressed fear that the Court has denied to students who wish to pray the right to do so. The implication of his dissent is that the right of spontaneous prayer has been denied. A state-sponsored formula of prayer is a far cry from spontaneous religious

14 Zorach v. Clausen, *supra* note 9, at 308.

15 *Id.* at 314.

16 Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

17 Engle v. Vitale, *supra* note 2, at 435 (footnote 21).

supplication. The Court has not said that a group of children by *unanimous* vote may not evolve and recite their own prayer, although if done on school property, it may be questionable.

It is doubtful that Mr. Justice Stewart would urge that a well disciplined class routine should be interrupted for the benefit of a few who have desires, either religious or otherwise, to indulge in some other extracurricular activity. School is a place for education. Church and home are the place for religious ritual. When man entered into organized society, he did so at the expense of sacrificing some of his whims to the will and discipline of the majority. It does not seem to be an undue restriction on a child's freedom of religious expression to hold that he may not arise and recite a prayer each morning after class has convened. On the other hand, it augurs grave danger, as the Court has indicated, to allow a government and its agents to formulate and direct exclusively religious ritual.

Mr. Justice Stewart fears for the future of predominantly patriotic ritual and public ceremonies which make reference to God, suggesting that a great part of our national heritage must be disavowed as a result of the majority opinion. "I am at a loss," he explains, "to understand the Court's . . . [contention that references to God in patriotic ritual] 'bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.' "[18] Apparently Mr. Justice Stewart feels no reassurance from the majority's footnote which purports to protect our public and secular ritual such as the Pledge of Allegiance, opening of court, singing the National Anthem and endless other patriotic and ceremonial practices having a predominantly secular benefit to which the fostering of religion is only incidental. The majority in *Zorach v. Clausen*, in dealing with an explanation of when and how the Church and State must act together, refers to "the common sense of the matter. Otherwise the State and religion would be aliens to each other. . . ."[19] It is this "common sense of the matter" to which the *Engel* majority alludes in footnote 21.[20] Mr. Justice Stewart does point out one practice which is highly suspect as a result of *Engel*. That is the deliverance of prayer is convening the daily sessions of Congress. Unlike military personnel who might be denied religious worship if it were not provided on the military installation, Congressmen have their churches and homes freely available. Prayer on the legislative floor, a distinct supplication as distinguished from the mere ceremonial adjunct in the opening of a court, may well be a violation of the Constitution. However, even conceding that several of the traditional practices cited by the Justice may be theoretically doomed as unnecessary benefits to religion, it is difficult to conceive how any party could be sufficiently aggrieved to achieve standing to challenge them.[21] As a practical

[18] *Id.* at 450 (footnote 9 to Mr. Justice Stewart's dissent).

[19] Zorach v. Clausen, *supra* note 9, at 312.

[20] Engel v. Vitale, *supra* note 2, at 435 (footnote 21).

[21] Kurland, "Of Church and State and the Supreme Court," 29 U. Chi. L. Rev. 1, 17 (1961).

matter, it is doubtful that the subject of the Justice's grave fears will become a reality.

It is to be hoped that the Court will stand firm in the face of public misunderstanding and resistance.[22] *Zorach* represented a Court that might back down in the face of opposition. The tendency might be to distinguish away *Engel* if a case arises whereby an individual teacher prescribes a prayer for his class. True, that would not appear to be as much a forerunner of a state church as a state agency recommendation implemented by local school board action. But for constitutional purposes, the teacher's action on school property is "state action" and is clearly unconstitutional.

For the future the case seems to forbode no substantial change in the course that decisions interpreting and applying the "establishment clause" have been taking.[23] *Engel v. Vitale* seems to reaffirm *McCollum* in all its rigor after some doubts were cast upon it by *Zorach*. Although some think federal aid to parochial schools is doomed by the instant decision, it appears on close analysis that *Engel*, like its predecessors, proscribes governmental activity only in a predominantly religious activity. Education has direct secular benefits; prayer, according to the Court, has none.

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[22] Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962), *cert. granted*, 371 U.S. 809 (1962); Abington Township School District v. Schempp, 201 F. Supp. 815 (E.D. Pa. 1962), *probable jurisdiction noted* 371 U.S. 807 (1962); Chamberlin v. Dade County Board of Public Instruction, 143 So. 2d 21 (Fla. 1962).

[23] *Engel* foreshadows affirmation on appeal of Schempp v. School District, *supra* note 22. In this case the District Court ruled unconstitutional a state statute which provided for compulsory reading of the Holy Bible each morning in class as a part of the opening ceremony, even though upon request any pupil could be excused. The Bible reading was combined with mass recitation of the Lord's Prayer.